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In The

Supreme Court of the [illegible]

October Term, 1973

No. 73-703

THE PUYALLUP TRIBE,

Petitioner,

v.

THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,

Respondent.

On Certiorari from the Supreme Court of Washington

BRIEF OF AMICI CURIAE

NATIONAL CONGRESS OF AMERICAN INDIANS, INC.
ARAPAHOE TRIBE OF WYOMING
CONFEDERATED SALISH & KOOTENAI TRIBES OF MONTANA
HOOPA VALLEY TRIBE OF CALIFORNIA
QUINAULT TRIBE OF WASHINGTON
THREE AFFILIATED TRIBES OF FORT BERTHOLD RESERVATION, NORTH DAKOTA

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I. Statement of Interest

Amicus curiae, the National Congress of American Indians, Inc. (NCAI), is a nonprofit association of some 147 Indian tribes, including virtually all of the major organized tribes in this country. Its purpose is to promote the interests of American Indians. It was incor-

porated in Oklahoma in 1954, and its national headquarters is at 1346 Connecticut Avenue, N.W., Washington, D.C.

The amici tribes named above are all organized, self-governing tribes, recognized as such by the Secretary of the Interior.

Your amici support the position of the Government representing the Puyallup Tribe in this case, and urge this Court to make explicit its implied holding in the first Puyallup case, 391 U.S. 392 (1968), that the Indians are entitled to a fair share of the fishery.

II. The Evolution of Fishing Rights Cases Before and After This Court Decided Puyallup I in 1968

Prior to this Court's decision in *Puyallup I*[1] there were three lines of cases construing Indian fishing rights. One position (the Idaho rule[2]) held that the state had no power at all to regulate the Indians' off-reservation treaty rights. This left the field to tribal and federal jurisdiction, and was the position most preferred by the Indians.

The second line of cases (the Ninth Circuit rule)[3] was based on this Court's *Tulee* decision in 1942,[4] which had said that the states could impose on the Indians' off-reservation fishing such restrictions concerning the time and manner of fishing "as are necessary for the conservation of fish." The Ninth Circuit held (1) that

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[1] *Puyallup Tribe* v. *Dept. of Game*, 391 U.S. 392 (1968).

[2] *State* v. *Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), cert. den. 347 U.S. 937.

[3] *Maison* v. *Confederated Tribes*, 314 F.2d 169 (9th Cir. 1963), cert. den. 375 U.S. 829; see also *Holcomb* v. *Confederated Tribes*, 382 F.2d 1013 (9th Cir. 1967); *Makah Tribe* v. *Schoettler*, 192 F.2d 224 (9th Cir. 1951).

[4] *Tulee* v. *Washington*, 315 U.S. 681 (1942).

the state had the burden of showing the "necessity" of its regulations as applied to Indians with treaty rights, and (2) that "necessary" meant "indispensable," and that meant that the state had to try to achieve conservation first by restricting non-Indians, who have no treaty rights, and only if that would not be sufficient could the state restrict the Indians who were exercising treaty rights.

The third line of cases (the Washington rule) held, as did the Ninth Circuit rule, that the state had the burden of showing that its regulations were "necessary". However, the Washington court rejected the Ninth Circuit's interpretation that "necessary" meant "indispensable".[5]

It might seem that the only difference between the Ninth Circuit rule and the Washington rule was whether "necessary" meant "indispensable". But that would overlook the real difference, which was one of attitude or approach. Whereas the Ninth Circuit followed the traditional rule of construction that Indian treaty rights are not to be construed narrowly,[6] the Washington court on

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[5] *Department of Game* v. *Puyallup Tribe*, 70 Wash. 2d 241, 422 P.2d 754 (1967) (Puyallup I).

[6] *United States* v. *Winans*, 198 U.S. 371, 380 (1905) ("we will construe a treaty with the Indians as 'that unlettered people' understood it"). See also *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918); *Seufert Brothers Co.* v. *United States*, 249 U.S. 194, 198 (1919); *Tulee* v. *Washington*, 315 U.S. 681, 684 (1942); *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 397-8 (1968); *Menominee Tribe* v. *United States*, 391 U.S. 404, 406 n.2, 412-13 (1968). The above are all fishing or hunting rights cases which but follow the general rule in all cases, see, e.g., *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) ("the language used in treaties with the Indians should never be construed to their prejudice"); *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 631 (1970) ("any doubtful expressions in [the treaty] should be resolved in the Indians' favor").

the other hand has always followed a narrow, grudging approach, of which the following is typical: [7]

> ". . . we are persuaded . . . that the time is long past when there should be a supercitizenship on the part of those proudly claiming Puyallup-tribe ancestry which entitles them to disobey laws and regulations imposed for the conservation of a great natural resource, which all other citizens must obey. However, it is a supercitizenship conferred by treaty, and only the United States can remove the discrimination."

When this Court affirmed Puyallup I, it seems clear that it was affirming the Washington court's actual ruling that the Indians had special treaty rights not enjoyed by other citizens, and that the state had the burden of showing that regulation of those rights was necessary for conservation. It also seems that this Court was disapproving the Ninth Circuit's "indispensable" interpretation of "necessary," [8] and a fortiori the Idaho rule that the state cannot regulate at all.

But we submit that this Court was *not* endorsing the Washington court's restrictive, grudging approach to Indian treaty rights. If it was, then these important rights can be rendered meaningless, as they were by the court below, and this Court's previously settled rule of construction (see note 6 above) has been ignored. We submit that the correct rule of construction remains the one expressed in *Winans*,[9] that the rights are to be construed in such a way as to give effect to what the In-

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[7] Puyallup I above 422 P.2d at 759. For other examples of Washington's narrow approach, see cases analyzed in Hobbs, *Indian Hunting and Fishing Rights II*, 37 Geo. Wash. L. Rev. 1251, 1253-1258 (1969); and see *State* v. *Moses*, 79 Wash. 2d 104, 483 P.2d 832 (1971).

[8] 391 U.S. at 401 n. 14.

[9] Note 6 above and other cases cited.

dians at the time of the treaty understood the treaty to mean. We think this Court said as much in *Puyallup I*, 391 U.S. at 397-8, and this has indeed been the approach of those cases (other than Washington's) which have been decided since *Puyallup I*.

The first Indian fishing case after *Puyallup I* was the *Sohappy* case.[10] In that decision, the U.S. District Court in Oregon, applying this Court's *Puyallup I* rule, held in a well-reasoned opinion that the upstream Indians, fishing outside their reservation, were entitled to take a "fair share" of the fish run, and that the state had to restrict non-Indian fishing downstream in order to allow a reasonable number of fish to reach the Indians. The state never appealed, and has attempted to comply with the ruling.

In the *Jondreau* case[11] the Michigan Supreme Court agreed with the Idaho rule (see note 2 above) that the state has no power to regulate off-reservation rights at all.

In the *Leech Lake*[12] case, a federal district court in Minnesota held that the Indians had fishing rights on state and federal public lands within an "opened" reservation, and indicated that Public Law 280[13] prevented the state from having regulatory jurisdiction over them.

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[10] *Sohappy* v. *Smith* (also *United States* v. *Oregon*), 302 F. Supp. 899 (D.Ore. 1969).

[11] *People* v. *Jondreau*, 384 Mich. 539, 185 N.W.2d 375 (1971). This view, though apparently inconsistent with this Court's decision in *Puyallup I*, has been supported elsewhere. See Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 Wash. L. Rev. 207, 218 (1972).

[12] *Leech Lake Band* v. *Herbst*, 334 F.Supp. 1001 (D.Minn. 1971).

[13] 67 Stat. 588, 18 U.S.C. § 1162(b), now 25 U.S.C. § 1321(b). This Act transferred jurisdiction over reservations in Minnesota (and certain other states) to the state, except that this was not to deprive any tribe "of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunt-

In the *Gurnoe* case,[14] the Wisconsin Supreme Court held that the Indians had off-reservation fishing rights, and remanded the case to give the state an opportunity to prove that its regulations were "necessary" for conservation. It is not yet clear whether that state will follow the traditional rule of construction as *Sohappy* did, or a narrow, grudging approach, as the Washington court below did.

The most recent case and, with *Sohappy* perhaps the best reasoned case, is the *Tinno* case,[15] wherein the Idaho Supreme Court held that the Indians have off-reservation treaty fishing rights and that the state cannot restrict them unless it proves the restrictions are necessary for conservation. While this language is technically the same as that of the court below (and of this Court),[16] the attitude, like that of *Sohappy*, is the traditional one of favorable construction of the treaty rights (see note 6 above). The *Tinno* court also referred to the "fair share" concept.[17]

Another major case is about to be tried in the federal court in Seattle, *United States* v. *Washington*, Civ. No. 9213, W.D.Wash. Some of the issues will presumably be settled by this Court's decision in the instant case, but many will not.

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ing, trapping, or fishing or the control, licensing, or regulation thereof." 334 F.Supp. at 1005. See *Menominee Tribe* v. *United States*, 391 U.S. 404, 410-411 (1968).

[14] *State* v. *Gurnoe*, 58 Wis.2d 390, 192 N.W.2d 892 (1972).

[15] *State* v. *Tinno*, 94 Ida. 759, 497 P.2d 1386 (1972).

[16] The Idaho court implicitly recognized that its earlier decision in *Arthur* (see note 2 above), that the state had no jurisdiction to regulate, was apparently modified by *Puyallup I*. The court did draw a distinction between an exclusive right, as was involved in *Tinno* and *Arthur*, and an in-common right, as in *Puyallup*, *Tulee*, etc., See note 11 above.

[17] 497 P.2d at 1394, as did *Sohappy*, 302 F.Supp at 911.

III. The Fair Share Concept Is The Only Sound Solution to the Problem of Defining Indian Treaty Fishing Rights

The *Sohappy* and *Tinno* cases (notes 10 and 15 above) point the way to a sound resolution of the fishing rights controversies between treaty tribes and state agencies that have plagued the Northwest in recent years. These Indians since time immemorial have fished certain streams for subsistence and trade, and by treaty they reserved the right to continue to do so, as part of the consideration for their agreement to vacate vast land areas for non-Indian settlement. *Sohappy* and *Tinno* recognize this. As this Court has required in cases dealing with reserved Indian water rights,[18] no less than sufficient fish to fulfill this purpose would comport with the Indians' reserved fishing rights. No less is fair to the Indians as a user group. Totally ignoring these legal rights secured by federal treaty, the State of Washington has prohibited any Indian net fishing for steelhead, denying the Indians any share of the fishery at all. The state agencies must be charged with assuring a fair share of the total fishery to the Indians in accordance with the treaty purpose.

Once it has been decided that the Indians are entitled to a fair share of the fish, most of the superficial issues disappear. For example, what difference does it make whether the Indians fish with long nets, or during closed season, or commercially, so long as they take no more fish than their tribal allocation?

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[18] See *Winters* v. *United States*, 207 U.S. 564 (1908), where this Court recognized Indian water rights, notwithstanding that there was no express treaty or statutory reservation of water rights. See also *Arizona* v. *California*, 373 U.S. 546 596-601 (1963); *United States* v. *Ahtanum Irrig. Dist.*, 236 F.2d 321 (9th Cir. 1956), cert. den. 352 U.S. 988; 330 F.2d 897 (9th Cir. 1956); 338 F.2d 307 (9th Cir. 1964), cert. den. 381 U.S. 924; Aschenbrenner, *State Power and the Indian Treaty Right to Fish*, 59 Cal.L.Rev. 485 (1971).

The problem is allocation, not conservation. Conservation is concerned only that enough fish survive to regenerate the species. All agree that this minimum number must get through. But above this minimum number the problem is allocation—who gets the surplus? The court below gave the Indians a zero share of the surplus simply because the sportsmen used up what was allegedly the entire surplus available. This is a sorry disregard of the Indians' treaty right to take fish, and we are confident that this Court will not let it stand.[19]

As a postscript, we would think that quite aside from any treaty rights, the Indians who have traditionally fished certain streams since time immemorial might well have a right of fishery by prescription, one that would support an injunction against other fisheries that threatened to extinguish the Indian fishery.[20] Even if not, it would seem that their long-standing user would give them as much right as the commercial and sports fishermen to a share of the fish.[21] In either case, it would seem that a state rule permitting the commercial and sports fisheries to take all the surplus fish would be discriminatory against the Indians, and a denial of Equal Protection.

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[19] At one of the tense confrontations between the Indians and state officials, an Indian said the Game Department "must think the steelhead swam over behind the Mayflower." Aberdeen (Wash.) Daily World, Jan. 22, 1964.

[20] We have found no case so holding, but generally, see 35 Am. Jur., *Fish & Game*, § 8 (1967); *Annot.*, 47 A.L.R.2d 381, 400 (1956); *Chalker* v. *Dickinson*, 1 Conn. 382, 6 Am.Dec. 250 (1815); cf. *Damon* v. *Hawaii*, 194 U.S. 154 (1904). For analogy to water rights, see *Winters* v. *United States*, note 18 above.

[21] Cf. *Fisher* v. *Everett*, 66 F. Supp. 540 (D. Alaska 1945); *Greaux* v. *Hatchette*, 164 F. Supp. 102 (D.V.I. 1958); Hobbs, *Indian Hunting and Fishing Rights I*, 32 Geo. Wash. L. Rev. 504, notes 24 and 25 (1964).

IV. Implementation of the Fair Share Concept Requires Attention to Due Process Problems

Once the basic problem is recognized as one of allocation, the remaining problem is determining how the allocating gets done. Thus far, the Game Department has not considered formal allocations as such, but has relied on certain rules to cut down the number of fish that are taken. For example, fishimg for steelhead is allowed only on certain days, or only with rod and reel (which is very inefficient for anyone but a sportsman who is willing to fish all day in hopes of catching one fish).

The Game Department should be instructed to make a specific allocation of steelhead to the Puyallup Tribe. However, in view of the past record of that Department, the Indians should not omly have the right to be heard before the Game Departtment in the decision-making process, but they should have representation on that agency itself, just as the sports interests do.[22] Your amici hope that this Court will specify these safeguards as a minimum required by Due Process in the adjudication of treaty rights. Each tribe's situation, and hence its fair share of the total catch, will differ, depending on prior tribal experience and customs, population, geography, present fisheries by others, impact on others, etc. Each situation will require evidentiary development and a fair weighing of equitable considerations; hence the

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[22] In Washington, the Department of Game represents the sports interests. Washington is uniique in that the Game Department is a self-supporting organizattion, receiving its revenue from the sale of hunting and fishing licenses, plus a little federal aid. *Hearings on S.J.Res. 170 and 171, Re Indian Fishing Rights, Before Subcommittee on Indian Affairs, Senate Committee on Interior Affairs,* 88th Cong. 2d Sess. (Aug. 5 and 6, 1964) at p. 29. The Game Department is headed by a six-man commission appointed by the Governor. The Sportsman's Council of Washington (a private association) recommends names, and the Governor normally picks from the Council's list. American Friends Service Committee, *An Uncommon Controversy,* at pp. 115-116 (N.C.A.1. 1967).

need for a fair hearing and representation on the allocating agency.

Once the allocations are made, it would be up to the tribe to regulate its members in realizing that allocation.[23]

CONCLUSION

The judgment below should be reversed, with instructions to adopt and implement the fair share concept.

Respectfully submitted,

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[23] *State* v. *Gowdy*, 1 Ore. App. 424, 462 P.2d 461 (1969), held that an Indian fishing outside the reservation at a time closed to fishing by tribal regulation, lost his immunity from state regulations. See also *Settler* v. *Yakima Tribal Court*, Civil No. 2378, E.D. Wash., May 5, 1971 (unpublished) (on remand from 419 F.2d 486), where the U.S. District Court held that the Yakima Tribal Court could properly punish a tribal member for violating tribal fishing regulations outside the reservation.